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### Deposited in DRO:

19 December 2018

### Version of attached file:

Accepted Version

### Peer-review status of attached file:

Peer-reviewed

### Citation for published item:

Perrone, Nicolas M. (2019) 'The "invisible" local communities : foreign investor obligations, inclusiveness, and the international investment regime.', *American journal of international law unbound.*, 113 . pp. 16-21.

### Further information on publisher's website:

<https://doi.org/10.1017/aju.2018.92>

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# THE “INVISIBLE” LOCAL COMMUNITIES: FOREIGN INVESTOR OBLIGATIONS, INCLUSIVENESS, AND THE INTERNATIONAL INVESTMENT REGIME

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International investment law is relational. It is about how we define and govern the relationship between the actors involved in and affected by foreign investment projects. Most international investment law literature confirms the relational nature of this field. The scholarship has analyzed the resolution of specific disputes and the regulatory relationship between foreign investors and host states. As could be expected, some of the key issues that have emerged include states’ right to regulate, the risk of regulatory chill, and how to review state regulation. There is, however, an important blind spot in this relational approach. A look at many foreign investment disputes, particularly in the natural resource extraction sector, shows that local communities are also central protagonists of foreign investment projects. These communities have a lot at stake but have remained almost invisible to the international investment regime. Apart from the ability to submit *amicus curiae* briefs, they have neither rights nor remedies in this regime.<sup>1</sup> This essay discusses international investment law from an inclusive relational perspective, and shows how, contrary to this perspective, recent awards in investor-state dispute settlement continue to render invisible local communities and their rightful aspirations.

## *A Relational Perspective on Foreign Investment*

Essentially, the international investment regime treats local communities as an absent actor. Foreign investment relations involve more than a foreign investor who wants to extract gold and a state that needs to decide whether this is environmentally acceptable. Very often, there is also a local community that has an interest in the same resources – often indigenous peoples.<sup>2</sup> Locals may want to continue their current economic activities, such as agriculture or small-scale mining, and may have legal entitlements over the land. What the international investment regime does in a quiet – but effective– manner is to render invisible these local entitlements and community values.

This contrasts with an *inclusive*, relational approach to foreign investment governance. This approach would highlight all the normative and distributive consequences of foreign investment projects (i.e., the multiplicity of rights and obligations at stake). In relational terms, foreign investor rights, states’ right to regulate, and local entitlements are often in tension. When investment tribunals are interpreting investment treaty standards of protection, they are also shaping and defining the public right to regulate. The literature examining the public law dimension of investment law underscores this. What has received much less attention is that the international

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<sup>1</sup> Nicolás M. Perrone, *The international investment regime and local populations: are the weakest voices unheard?*, 7 TRANSNAT’L LEGAL THEORY 383 (2016).

<sup>2</sup> See James Anaya, *Extractive industries and indigenous peoples*, Report of the Special Rapporteur on the rights of indigenous peoples to the Human Rights Council, A/HRC/24/41 (2013).

investment regime also affects obligations that foreign investors may have toward the local community. Making local communities invisible shifts costs and risks to these communities.

### *Foreign Investor Obligations and Local Rights*

Foreign investors have different obligations to local communities. They have to comply with international human rights obligations and, importantly, they also need to respect property and contractual obligations as defined in domestic and – increasingly but still limitedly – in international law. These property and contractual obligations can be divided into four categories. First, foreign investors must respect the property rights of those living near the project, including individual or communal rights in the case of indigenous land. Some of these obligations have been incorporated in international conventions and documents, such as the International Labor Organization (ILO) Convention 169 and the Food and Agriculture Organization's *Voluntary Guidelines on the Responsible Governance of Tenure*. Second, if foreign investors own property, that may create obligations to the community, such as to let people pass through the property. Third, foreign investors may enter into specific transactions or make representations to local actors, such as in community benefit agreements, creating contractual or reliance obligations.<sup>3</sup> These obligations are typically governed by domestic law and, in some instances, foreign investors are required to enter into these agreements. Finally, foreign investors arguably owe an obligation to the community as a whole to contribute to local values and prosperity.<sup>4</sup>

The scope and enforcement of these property and contractual obligations have been muddled by the internationalisation of foreign investor rights. Allowing foreign investors to enforce their rights internationally means that those locals whose rights are affected cannot bring these interests within the same legal process. The large majority of local entitlements – and correlative foreign investor obligations – are governed by domestic law. They are normally not recognized by international investment law and local actors, in any case, have no standing before investment tribunals (except for amicus curiae submissions). This result is problematic because investment tribunals may affect local community interests through the interpretation of foreign investor rights. Many foreign investment disputes involve the distribution and use of land.<sup>5</sup> At best, in some instances, local communities can bring claims against their states before human rights tribunals, such as the Inter-American Court of Human Rights, the African Court of Human Rights, or the European Court of Human Rights. But this is rarely enough.

An alternative could be to allow host states (or local communities) to enforce these foreign investor obligations in international investment tribunals. To be enforceable by an international investment tribunal, there would need to be a clear set of foreign

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<sup>3</sup> See Joseph William Singer, *The Reliance Interest in Property*, 40 STANFORD L. REV. 611 (1988).

<sup>4</sup> See Gregory Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2008).

<sup>5</sup> Lorenzo Cotula, *Land, Property and Sovereignty in International Law*, 25 CARDOZO J. INT'L & COMP. L. 219 (2016).

investor obligations in international law, which arbitrators would then interpret. The *UN Guiding Principles on Business and Human Rights* are a good example of this, which state that business enterprises should respect human rights. But this process would not be free from problems. First, rewriting property or contractual obligations in international human rights, environmental or corporate social responsibility language creates more fluid and less specific international law obligations. These obligations may promote universal goals but not specific community interests.<sup>6</sup> Secondly, there currently is little clarity about whether it is the state or the investor who is responsible for upholding these human rights obligations. Thirdly, the scope of such norms remains particularly vague, creating fertile soil for different interpretative choices, as I now illustrate. All this casts doubt on whether an ad-hoc or permanent investor-state dispute settlement (ISDS) mechanism – an expensive forum specialized in foreign investment protection – is the appropriate institutional choice for a more inclusive and relational approach to foreign investment disputes.<sup>7</sup>

### *Enforcing Foreign Investor Obligations in Investment Tribunals*

The first obstacle to enforcing foreign investor obligations – and local community rights – in an investment tribunal is jurisdiction. Investment treaties do not provide local communities with access to ISDS or substantive rights. The communities can only submit amicus briefs. In the international investment regime, local communities are represented by the state and, as a result, locals depend on their respective governments to promote their interests.

States can rarely sue foreign investors under international investment treaties, but they can rely on different strategies to enforce foreign investor obligations when sued. The first one is to bring a counterclaim. The wording of the applicable international investment treaty is critical to this strategy. Where arbitrators have accepted a counterclaim, including in *Urbaser v. Argentina*, the arbitration clauses have been broadly worded to allow the tribunal to decide “any dispute” between the parties related to the investment. Tribunals have been more restrictive, however, when the wording of the treaty refers to specific causes of action.<sup>8</sup> Importantly, most new generation investment treaties do not grant jurisdiction to resolve disputes concerning corporate social responsibility or other similarly worded clauses.

An alternative is to convince foreign investors to accept the jurisdiction of a tribunal to decide issues beyond the scope of the arbitration clause. This may seem unlikely; however, foreign investors may prefer to have an investment tribunal rather than a domestic court hear such a claim. This occurred in *Burlington v. Ecuador*, where Burlington initially stated that it would challenge the tribunal’s jurisdiction over

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<sup>6</sup> See Martti Koskenniemi. *The Subjective Dangers of Projects of World Community* in REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 3-13 (A. Cassese ed., 2011) 10.

<sup>7</sup> For an analysis of some of the institutional choices to reform ISDS, see Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT’L L. 361 (2018).

<sup>8</sup> Compare *Urbaser v. Argentina* (ICSID Case No. ARB/07/26) Award (Dec. 8, 2016), with *Rusoro Mining v. Venezuela* (ICSID Case No. ARB(AF)/12/5) Award (Aug. 22, 2016).

Ecuador's counterclaim for environmental degradation but later decided to accept it.<sup>9</sup> This approach allows the tribunal to decide both the rights and the obligations of the investor. The problem is that these decisions are made in an international arbitral forum specialized in foreign investment protection, conducted far away from the local community.

Alternatively, a state can rely on foreign investor obligations as a defense to either bar the investor's claim or reduce the compensation the state pays. This strategy has been useful for states when they can prove that the investor engaged in corrupt acts or violated host state laws. Investment tribunals have treated corruption strictly, dismissing a claim if there is evidence of bribery. In *World Duty Free v. Kenya*, the tribunal rejected the claim, noting that the prohibition of corruption is a matter of transnational public policy.<sup>10</sup> Other tribunals have dismissed claims based on serious violations of domestic law during the establishment of the project.<sup>11</sup> Defenses based on less serious violations of domestic law have led tribunals to reduce the compensation states must pay to investors. Tribunals have accepted contributory fault when foreign investors fail to comply with domestic law (*MTD v. Chile*) or act in breach of domestic regulations, but where the state's sanction was disproportionate (*Occidental v. Ecuador 2*).<sup>12</sup>

#### *The Lessons of Copper Mesa, Bear Creek and Urbaser*

Recently, the tribunal in *Copper Mesa v. Ecuador* had the opportunity to examine the behavior of the foreign investor towards the local community, and to decide whether this behavior could serve as a basis to either reject the claim or reduce the compensation owed by the state.<sup>13</sup> The local community strongly opposed the project from the start. In analyzing the dispute, the tribunal acknowledged the "reckless escalation of violence which [the investor] (by itself and by its contractors and subcontractors) had introduced into the Junín area."<sup>14</sup> In the arbitrators' view, Copper Mesa "had acquired, irrevocably, a malign reputation for intimidation, threats, deception, mendacity and violence amongst members of the local communities."<sup>15</sup>

The government eventually terminated the concessions, and Copper Mesa filed an arbitration claim demanding compensation for a violation of the Canada-Ecuador investment treaty. Ecuador asked the tribunal to find that it had no jurisdiction and that the claim was inadmissible as a consequence of the investor's illegal behavior. The tribunal did not accept this argument; it concluded that Ecuador was aware of Copper Mesa's behavior and did not act in a timely way, and that Ecuador could have done more

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<sup>9</sup> *Burlington Resources v. Ecuador* (ICSID Case No. ARB/08/5) Decision on Ecuador's Counterclaims, para. 6 (Feb. 7, 2017).

<sup>10</sup> *World Duty Free v. Kenya* (ICSID Case No. ARB/00/7) Award (Oct. 4, 2006).

<sup>11</sup> *Inceysa Vallisoletana v. El Salvador* (ICSID Case No. ARB/03/26) Award (Aug. 2, 2006).

<sup>12</sup> *MTD v Chile* (ICSID Case No. ARB/01/7) Award (May 25, 2004); *Occidental Petroleum v. Ecuador* (ICSID Case No. ARB/06/11) Award, (Oct. 5, 2012).

<sup>13</sup> *Copper Mesa v. Ecuador* (PCA Case No. 2012-02) Award (Mar. 15, 2016).

<sup>14</sup> *Id.*, para. 4.265.

<sup>15</sup> *Id.*

to help the foreign investor carry out the project.<sup>16</sup> Barring the claim was, for the tribunal, a “stark and potentially harsh” result.<sup>17</sup> The tribunal “preferred” to base the decision on the investor’s negligence, rather than to conclude that Copper Mesa’s actions had been willfully driven by the senior management in Canada.<sup>18</sup> The arbitrators decided that Ecuador had expropriated the concessions and violated the fair and equitable standard of treatment under the treaty. Yet they also accepted that the foreign investor had contributed to the unviability of the project and therefore reduced the compensation by 30%.

The reasoning in *Copper Mesa* shows how arbitrators take into account foreign investor behavior towards local communities. It is difficult to imagine a case in which the foreign investor could have acted less responsibly. The tribunal, however, only granted a mere 30% discount.<sup>19</sup> This discount is not high compared to the 50% discount of *MTD v. Chile*, where the foreign investor did not take Chilean law into account when planning the investment. Moreover, the importance given to the state’s awareness of the situation highlights the obstacles confronting those who seek to enforce foreign investor obligations towards local communities. Sometimes, as in this case, states overlook or promote actions that may affect local community interests. For the *Copper Mesa* tribunal, crucially, this attitude reduced the foreign investor’s responsibility for its misconduct. The outcome of this approach is that even when foreign investor actions lead to social unrest, the investors are rarely held responsible and might even receive some compensation if the project is later cancelled.

The case of *Bear Creek v. Peru* is similar in this respect. Bear Creek successfully challenged the existence of an international law obligation towards the local community, relying on domestic law, which is normally understood to be the less favorable law to foreign investors.<sup>20</sup> This project also found great local opposition but enjoyed support from the Peruvian government, which lasted until the protests turned violent and an emergency cabinet meeting cancelled the exploration license. The tribunal found that Peru had expropriated the right to seek a permit to mine and violated the investor’s due process rights by failing to invite the foreign investor to participate in a key meeting. The arbitrators acknowledged that the community did not trust Bear Creek.<sup>21</sup> According to the tribunal, however, the Peruvian government not only approved the outreach program in accordance with domestic law but also knew of the community’s discontent. As a result, the arbitrators found that the foreign investor had no further responsibility in this regard.<sup>22</sup>

The dissenting arbitrator disagreed. Relying on *Urbaser v. Argentina*, he considered that the ILO Convention 169, which requires states to obtain the free, prior, informed and consent (FPIC) of indigenous peoples, also imposes an obligation to

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<sup>16</sup> *Id.*, paras. 5.63-4 and 6.83.

<sup>17</sup> *Id.*, para. 5.55.

<sup>18</sup> *Id.*, para. 6.100.

<sup>19</sup> *Id.* para. 6.96-102.

<sup>20</sup> *Bear Creek Mining v. Peru* (ICSID Case No. ARB/14/2) Award (Nov. 30, 2017).

<sup>21</sup> *Id.* para. 403-7.

<sup>22</sup> *Id.* para. 409-414.

foreign investors not to engage in actions that can affect human rights.<sup>23</sup> Crucially, he highlighted that under international law both foreign investors and local communities have rights.<sup>24</sup> The majority rejected this position, however, noting that the ILO Convention 169 only imposes an obligation on states, and that the local community is not a party to the investment arbitration.<sup>25</sup>

Aside from this arbitral interpretation, the human rights-based protection of local community interests has other shortcomings. The celebrated award in *Urbaser v. Argentina* granted jurisdiction to hear Argentina's counterclaim, as the arbitrators accepted that foreign investors have an obligation "not to engage in activity aimed at destroying [human] rights."<sup>26</sup> The issue, however, is that states have the primary duty to protect human rights from abuse by third parties, and it is difficult to define the scope of the duties of foreign investors. This weakens this approach considerably. For one, it is unlikely that foreign investors will violate human rights openly and deliberately. The *Copper Mesa v. Ecuador* is a serious case of misconduct – which included criminal activity – and the arbitrators only granted a 30% discount. For another, most foreign investors only invest after securing sufficient state support, support that can be later used to show state inconsistency, awareness of misconduct, and the need to protect the investor despite its obligations (as occurred in *Copper Mesa* and *Bear Creek*).<sup>27</sup>

If states have the responsibility to pursue the enforcement of foreign investor human rights-based obligations, moreover, this approach to protect local interests would create problems similar to those found in diplomatic protection. Local communities would have no means to ensure that states protect their interests or that they transfer any compensation back to the community. This is why most legal systems operate under a different structure. Those who are involved in a legal relationship have rights and obligations that they can enforce directly.

But many investment tribunals, including *Urbaser v. Argentina*, limit this relational approach. That award opened up the possibility of limited human rights-based counterclaims while it closed down the protection of property and contractual local community rights. The arbitrators decided that foreign investor contractual obligations were outside the jurisdiction of the tribunal. The tribunal noted that:

[...] while Respondent correctly introduces the principle of *pacta sunt servanda* as a principle of international law, it identifies the relevant *pactum* as Claimants' obligation to invest in expansion work, thus relying again on the Concession Contract and admitting that international law does not provide a cause of action for the Counterclaim.<sup>28</sup>

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<sup>23</sup> *Id.* para. 10 (Philippe Sand's Dissent).

<sup>24</sup> *Id.* para. 36 (Philippe Sand's Dissent).

<sup>25</sup> *Id.* para. 664-666.

<sup>26</sup> *Urbaser v. Argentina* (ICSID Case No. ARB/07/26) Award (Dec. 8, 2016), paras. 1199-1210.

<sup>27</sup> See Perrone, *supra* note 1, at 391-400.

<sup>28</sup> *Urbaser v. Argentina* (ICSID Case No. ARB/07/26) Award (Dec. 8, 2016), para. 1206.

This conclusion exacerbates the inherent asymmetry of international investment law: the internationalisation of foreign investor rights without internationalizing the corresponding property and contractual obligations of foreign investors. It also undermines creative contractual solutions to promote local community interests.<sup>29</sup> It is true that international investment law does not prevent states from regulating to protect local community interests or hinder local courts from finding foreign investors responsible for damages. But there are limitations to this because states need to create a good investment climate, attract foreign investors and, ultimately, face financial constraints to compensate foreign investors, as where they were aware of the foreign investor's misconduct.

### *Conclusion*

Foreign investment's contribution to sustainable development depends on foreign investor obligations, among other things. A legal regime in which adjudicators have broad jurisdiction to decide on state measures that may affect foreign investor property and contractual rights but very limited scope to examine foreign investor correlative obligations contradicts the complex and relational character of the investment process. ISDS, however, may not be the right forum in which to decide on both foreign investor rights and obligations. The challenge is to find (or create) the appropriate institutional mechanism.

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<sup>29</sup> See Ibrionke T. Odumosu-Ayanu, *Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework*, 15 MELB. J. INT'L L. 473 (2014).